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**In the Supreme Court of the United States**

**OCTOBER TERM, 1990**

**ANNE M. HART, ET AL., PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE UNITED STATES  
IN OPPOSITION**

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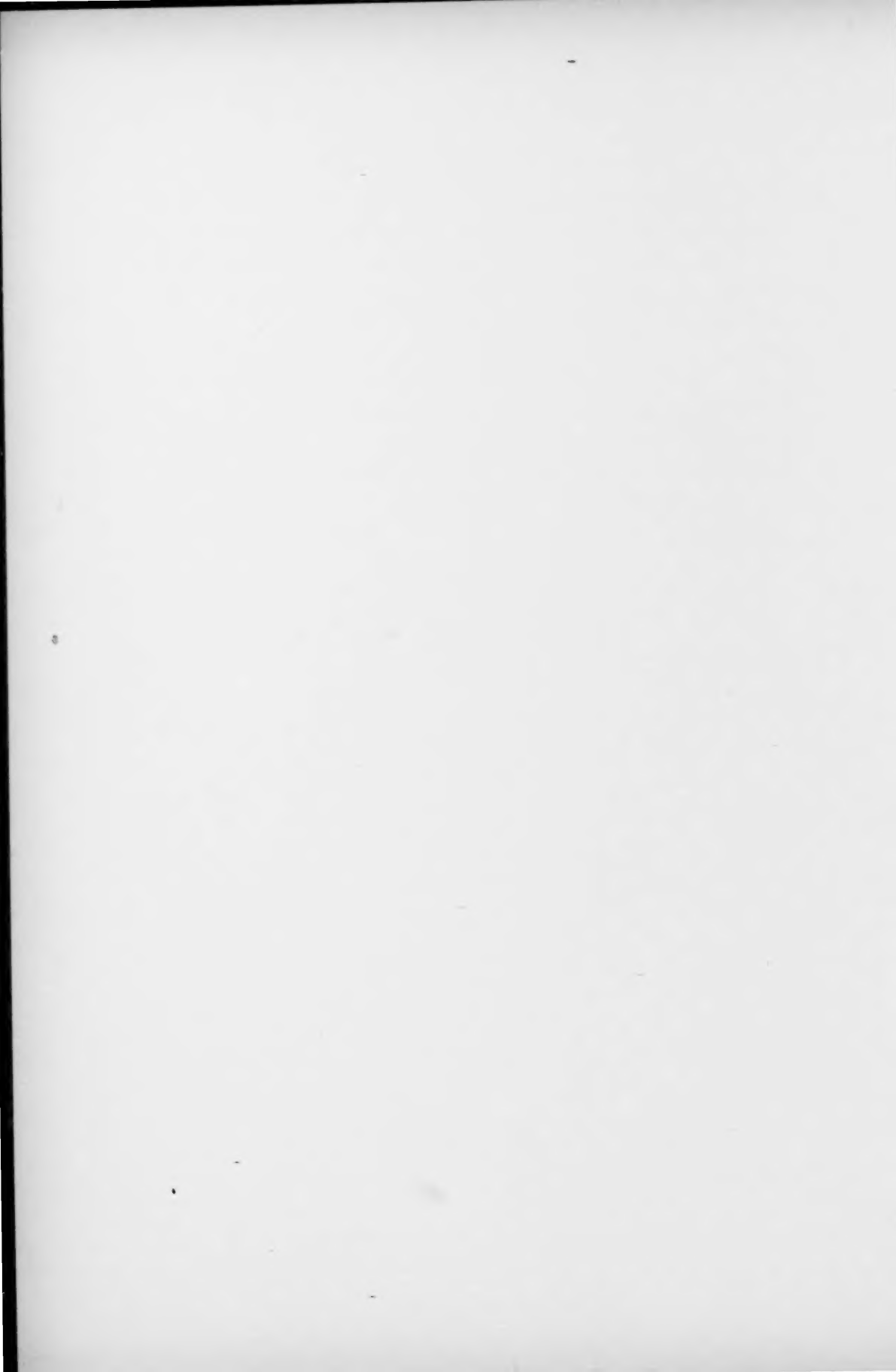
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## QUESTIONS PRESENTED

1. Whether the selection and use of forensic anthropological identification procedures in order to identify whether remains are those of deceased servicemen is within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a).

2. Whether the actions taken by the government regarding the attempted identification of a service-member amounted to the intentional infliction of emotional distress under Florida state tort law.



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## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 894 F.2d 1539. The opinion of the district court granting summary judgment in favor of petitioner Anne Hart (Pet. App. 19a-27a) is reported at 681 F. Supp. 1518. The opinion of the district court granting judgment in favor of petitioners Vera and Gillian Hart and awarding damages to petitioners (Pet. App. 28a-38a) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on March 1, 1990. A petition for rehearing was denied on April 27, 1990. Pet. App. 39a. The petition

for a writ of certiorari was filed on July 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioners are the wife, mother, and daughter of United States Air Force Lieutenant Colonel Thomas Hart, III. On December 21, 1972, during the Vietnam War, Colonel Hart was one of 16 crewmen aboard a USAF aircraft that was conducting an armed reconnaissance mission over Laos. The plane was hit by anti-aircraft fire and crashed in the area of Pakse, Laos. Two crewmen escaped by parachute and were rescued immediately by American search and rescue forces. Pet. App. 2a.

On the day after the crash, Royal Laotian troops friendly to the United States visited the crash site and found part of a human arm, including the hand. American officials using fingerprinting identified the hand as belonging to crewman Captain Joel Birch. Captain Birch was declared killed in action (KIA), and the 13 unaccounted-for members of the crew, including Colonel Hart, were listed as missing in action (MIA). Pet. App. 2a.

In 1978, the Air Force convened a status review board to review the status of Colonel Hart. Hart's wife, petitioner Anne Hart (Mrs. Hart), participated in the proceeding. After conducting a hearing and considering the evidence of the circumstances in which Colonel Hart's aircraft was shot down,<sup>1</sup> the

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<sup>1</sup> The evidence before the status review board showed that the aircraft exploded in mid-air and plummeted to the ground engulfed in a fireball. Search and rescue forces received only two emergency beeper signals, and the two crewmen who bailed out and sent those signals stated in their debriefing in-

status review board found that Colonel Hart was killed in action on December 21, 1972. Mrs. Hart concurred in the finding; her representative at the proceedings stated that, in Mrs. Hart's view, her husband could not have survived the shooting down of his airplane.<sup>2</sup> Pursuant to the status review board's findings, the Air Force on October 5, 1978, formally changed Colonel Hart's status from MIA to KIA. In separate proceedings, the same status change was effected with respect to each of the other 12 unaccounted-for crewmen involved in the Pakse crash. Pet. App. 3a.

In February 1985, U.S. Army personnel, acting with the permission of and in conjunction with Lao-tian authorities, conducted an excavation of the Pakse crash site. The Army team found approximately 50,000 bone fragments, along with various ID tags and other personal effects belonging to the Pakse crew. The remains and personal items were transported to the Army's Central Identification Laboratory in Hawaii (CILHI), which is responsible for identifying the recovered remains of U.S. servicemen listed as killed or missing in action in Southeast Asia. After studying the remains for several months, CILHI determined that pieces of bone had been found corresponding to each of the 13 unaccounted-for Pakse crewmen. On July 1, 1985,

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interviews that no one else exited the aircraft. See Pet. App. 13a.

<sup>2</sup> Mrs. Hart had previously testified before Congress that "I have little doubt that my husband is dead. \* \* \* It is a reasonable presumption [that] my husband is dead." *Americans Missing in Southeast Asia: Hearings Before the House Select Comm. on Missing Persons in Southeast Asia*, 94th Cong., 2d Sess. Pt. 4, at 147 (1976).



the Armed Services Graves Registration Office (ASGRO), formally approved the identification of certain remains as belonging to Colonel Hart. (Seven pieces of bone were identified as Colonel Hart's). Mrs. Hart was immediately notified of the identification. Pet. App. 3a.

On July 5, 1985, Mrs. Hart filed suit in the United States District Court for the Northern District of California, seeking an injunction prohibiting the government from forwarding the identified Pakse remains to the various next of kin before Dr. Michael Charney, a private forensic anthropologist retained by her, was allowed to conduct his own examination of the remains. The government agreed to allow Dr. Charney to examine the seven pieces of bone that had been identified as those of Colonel Hart, but no others.<sup>3</sup> After conducting his examination, Dr. Charney stated in a declaration that "[i]t is impossible to determine whether these [bone] fragments are from LTC HART or any other individual, whether they are from one individual or several, or whether they are even from any of the crew members of the AC-130A aircraft in question." Decl. of Michael Charney 5; Pet. App. 4a.

Since Dr. Charney had been allowed to examine some of the remains, as Mrs. Hart had requested in her complaint, the United States District Court for the Northern District of California, on July 18, 1985, dismissed Mrs. Hart's action with prejudice. Based on Dr. Charney's conclusion, however, Mrs. Hart expressed disagreement with the government's identifi-

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<sup>3</sup> Several Pakse families had filed declarations with the court stating that it would be inappropriate for a private individual acting on behalf of Mrs. Hart to disturb the remains that had been identified as belonging to their loved ones.

cation of her husband's remains, and her disagreement was brought to the attention of Verne Orr, Secretary of the Air Force. After personally examining the entire case file, including Dr. Charney's declaration, Secretary Orr directed that a letter be sent to Mrs. Hart informing her that if she did not wish to accept her husband's remains, they would be buried, with full military honors, at Arlington National Cemetery. Pet. App. 4a.

At about the same time that Secretary Orr approved the identification of Colonel Hart's remains, the Army commissioned an independent, civilian inquiry into the operation of CILHI. When Mrs. Hart learned that an inspection of CILHI was to take place, she contacted the office of the Secretary of the Air Force, and requested that the burial of the remains identified as her husband's be delayed. The Secretary promptly granted her request, and the interment of Colonel Hart's remains was postponed indefinitely. Pet. App. 5a.

The civilian panel commissioned to look into CILHI's operations filed its report in December 1985. The panel found that the administration of CILHI was excellent, and that CILHI's personnel were well-trained, experienced, and technically competent. The panel concluded, however, that only two of the 13 Pakse identifications could be confirmed with confidence. According to the panel, some of the Pakse identifications did not appear to be justified according to standard forensic methods and therefore could not withstand scientific scrutiny. Pet. App. 5a.

After the panel issued its report, the Air Force notified the families of the 13 still unaccounted-for Pakse crewmen that, if they wished, the identifications of their loved ones would be reconsidered. Mrs. Hart requested reconsideration of her husband's

identification. On June 10, 1986, ASGRO formally rescinded its identification of Colonel Hart. ASGRO also rescinded the identification of one other Pakse crewman, Captain George McDonald. Pet. App. 5a.

2. In 1986, petitioners filed their complaint in this action in the United States District Court for the Northern District of Florida. Petitioners alleged that the United States was liable for damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, for the intentional infliction of emotional distress, as that tort is defined under Florida state law. Referring to Dr. Charney's examination and the civilian panel's report, the complaint alleged that the actions of the Army and the Air Force surrounding the identification of Colonel Hart's remains, and the rescission of that identification, constituted outrageous and extreme behavior designed to inflict severe mental suffering. Petitioners also suggested that Colonel Hart might still be alive. See Pet. App. 5a-6a.

The government filed a motion to dismiss, contending among other things that petitioners' action for damages was barred by the FTCA's discretionary function exception, 28 U.S.C. 2680(a). On March 17, 1987, the district court denied the motion without opinion. Pet. App. 6a.

On cross-motions for summary judgment, the district court held that the government was liable to Mrs. Hart under Florida law for committing the tort of intentional infliction of emotional distress. Pet. App. 19a-27a. After a trial, the court held that the government was liable to petitioners Vera and Gillian Hart as well. *Id.* at 28a-38a. The district court awarded petitioners a total of \$632,814.62 in damages. *Id.* at 33a, 38a.

The court observed that, under applicable tort principles, liability could attach for the government's conduct "only [if] the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Pet. App. 25a. The court found that, as a matter of law, that standard was satisfied in this case. The court relied on three aspects of the government's conduct: First, the court stated that the government's initial identification of certain of the Pakse remains as belonging to Colonel Hart was "outrageous." *Id.* at 26a. Second, the court pointed to Secretary Orr's letter of October 1985 informing Mrs. Hart that, if she did not wish to inter her husband's remains, the government would proceed to inter them with full military honors at Arlington National Cemetery. *Ibid.* The court characterized the letter as an improper "ultimatum." *Ibid.* Third, the court faulted the government's assessment that Colonel Hart is "accounted for" for purposes of the Executive Branch's ongoing accounting of our nation's servicemen killed or missing in Southeast Asia. *Id.* at 27a. Focusing on petitioners' assertion that Colonel Hart might still be alive, the court criticized the Defense Intelligence Agency's (DIA's) intelligence assessment of the Pakse incident. *Ibid.* The court suggested that it did not agree with the DIA's determination that there were no survivors of the crash other than the two crewmen who parachuted out and were immediately rescued. *Ibid.*<sup>4</sup>

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<sup>4</sup> The district court also disagreed with the government's assessment that the excavation of the Pakse crash site was thorough. Pet. App. 24a n.10.

3. The court of appeals reversed, and ordered judgment entered in favor of the United States. Pet. App. 1a-18a. The court held, first, that petitioners' action was barred by the FTCA's discretionary function exception. *Id.* at 7a-15a. The court separately discussed each of the three governmental decisions that the district court had criticized, and concluded that all three were protected "discretionary functions" under the FTCA. *Ibid.* In the alternative, the court of appeals held that, as a matter of law, the United States was entitled to judgment on the merits of petitioners' claim of intentional infliction of emotional distress. *Id.* at 15a-18a. The court explained that the record did not support petitioners' assertion that the government had intentionally inflicted emotional distress upon them. *Ibid.* The court stated that the district court's conclusion to the contrary was "difficult to understand." *Id.* at 17a.

### ARGUMENT

1. Petitioners contend that the decision below is inconsistent with *Berkovitz v. United States*, 486 U.S. 531 (1988), *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Dalehite v. United States*, 346 U.S. 15 (1953). Pet. 9.<sup>5</sup> There is no merit to that claim. Those decisions make clear that Congress enacted the discretionary function exception in order to ensure that the FTCA is not used as a vehicle for second-guessing governmental policy judgments. See, e.g., *Varig Airlines*, 467 U.S. at 814, 820. The court of

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<sup>5</sup> Petitioners also point to this Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). That decision, however, did not involve the discretionary function exception. See *id.* at 64; *Varig Airlines*, 467 U.S. at 812.



appeals expressly acknowledged that congressional purpose, Pet. App. 8a, and correctly held that the decisions petitioners criticize embody precisely the kind of discretionary policy judgments that Congress sought to insulate from judicial review under the FTCA.<sup>6</sup>

a. Petitioners' primary assertion throughout this litigation has been that CILHI, in its efforts to identify the Pakse remains, did not limit itself to the standard methodologies routinely used in the field of forensic anthropology. See Pet. App. 10a. That assertion, which the government has never disputed as a factual matter,<sup>7</sup> cannot serve as a basis for holding the discretionary function exception inapplicable. It overlooks the obvious fact that CILHI is a unique institution charged with a unique mission: the identification of military combat remains. As the court of appeals correctly observed, Pet. App. 10a, the proc-

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<sup>6</sup> Petitioners also assert that the court of appeals erred because it disregarded its own precedents stating that a governmental act falls within the coverage of the discretionary function exception if it is performed at a planning rather than an operational level. Pet. 9-10, 12. In reality, however, the court of appeals cited its own precedent for that very proposition. Pet. App. 9a. In any event, an alleged intracircuit conflict is a matter for the court of appeals, not this Court, to resolve.

<sup>7</sup> Petitioners also assert that "[t]he government admitted that science played no part in the identification." Pet. 14. That assertion is plainly mistaken. Rather, the government admitted that the bone fragments originally attributed to Colonel Hart cannot be identified as the remains of Colonel Hart by any method presently generally accepted in the scientific community. As the court of appeals correctly noted, Pet. App. 6a-7a n.4, that admission in no way detracts from the government's position, since the government's position is that, as a matter of policy, its identification processes are not constrained by the prevailing dictates of forensic anthropology.

esses employed in the government's identification of military combat remains necessarily differ in some respects from the conventional scientific practices recognized in the ordinary civilian context of forensic anthropology. Military combat remains, especially those found in aircraft crashes, are often (as in this case) commingled and severely burned and shattered. *Ibid.* Common sense suggests, and the record shows, that such remains are not routinely encountered in the nonmilitary context. For that reason, conventional scientific methodology is simply not geared to the identification of such remains. See *ibid.*

The government, however, seeks to achieve identifications if possible. Pet. App. 9a. The record in this case shows that the government has made the judgment that identification of the remains of our troops who have fallen in combat is a desirable objective. *Ibid.* This policy dates from the Civil War era, and has recently assumed heightened relevance in the aftermath of the Vietnam conflict. See *ibid.*

The methods employed in the identification process are inextricably intertwined with the policy that identifications should be made if possible. If CILHI were constrained by the dictates of forensic anthropology currently prevailing in the civilian scientific community, CILHI's ongoing identification project would be severely hampered. Recognized techniques of forensic anthropology, developed for use by local coroners' offices and the like in the ordinary civilian sphere, suffer from inherent limitations that would unduly inhibit the military's ability to fulfill its identification mission.

The special nature of the military's identification effort is underscored by the contrast between CILHI's approach to the Pakse identifications and the approach

taken by Dr. Charney, the civilian expert retained by Mrs. Hart. The salient feature of Dr. Charney's approach was his unwillingness to make even the most basic assumption that the bones found at the Pakse crash site were the bones of the Pakse crewmen. In contrast, this threshold assumption was a key premise underlying the government's entire identification effort. As the court of appeals correctly explained, Pet. App. 10a-11a, CILHI's identification of the Pakse remains relied in part on a process of elimination; CILHI personnel associated certain remains with Colonel Hart on the basis that they could not be correlated with the known physiological characteristics of any of the other crew members. Specifically, certain of the remains were identified as Colonel Hart's because, based on a set of inferred physical characteristics derived from the remains by using anthropological approximation methods, it was determined that the remains matched Colonel Hart's anatomical features and did not match those of anyone else in the aircraft. *Id.* at 11a.<sup>8</sup>

The steps taken by CILHI to make identifications reflect the government's policy that, to the extent possible, remains of American servicemen killed in action should be identified and afforded proper burials. This policy embodies political, moral, and military judgments—judgments that are not constrained by law and are within the discretion of the Executive Branch.

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<sup>8</sup> As the court of appeals correctly noted, Pet. App. 3a-4a, when government officials notified Mrs. Hart on July 1, 1985, that the CILHI had identified certain of the Pakse remains as her husband's, they told her that the identification had been based in part on a process of elimination. Thus, to the extent that petitioners assert that they were misled as to the nature of the identification, that assertion is plainly mistaken.



It is precisely such policy judgments that, in the context of damages actions under the FTCA, are insulated from judicial second-guessing by virtue of the statute's discretionary function exception. See Pet. App. 12a. Accordingly, the court of appeals was correct in concluding that the government's choice of the appropriate methodology to use in the identification effort falls within the coverage of Section 2680(a). That conclusion does not conflict with the decision of any other court.<sup>9</sup>

b. Petitioners and the district court also point to the decision by the Secretary of the Air Force in October 1985 to send a letter to Mrs. Hart informing her that if she did not wish to accept her husband's remains, they would be buried, with full military honors, at Arlington National Cemetery. The court of appeals was correct in holding that Secretary Orr's decision to send the letter is a "prime example" of the exercise of ~~the~~ discretionary function. Pet. App. 15a. As the court noted, the record in this case shows that Secretary Orr made a judgment based on his own assessment of the reliability of the Army's identification processes and the importance to the military of proper interment of the remains of servicemen killed in action. *Ibid.* The record shows that Secretary Orr was aware of and considered Mrs. Hart's concerns and Dr. Charney's conclusions, but deter-

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<sup>9</sup> Petitioners erroneously assert that on this point the decision below conflicts with the decision of the Second Circuit in *Hendry v. United States*, 418 F.2d 774 (1969), and the district court in *Kohn v. United States*, 591 F. Supp. 568 (E.D.N.Y. 1984), *aff'd* without published opinion, 760 F.2d 253 (2d Cir. 1985) (Table). Pet. 12-13. Neither case involved the identification of remains, and the court of appeals properly concluded that both cases are inapposite. Pet. App. 10a & n.6.

mined on balance that proper interment of the remains that he reasonably and in good faith believed to be those of Colonel Hart was the appropriate course of action. It may be that Secretary Orr could reasonably have made a different decision, but no statute or regulation dictated a particular result. *Ibid.* As Secretary of the Air Force, Secretary Orr was charged with both the responsibility and the authority for making that decision, and his exercise of discretion and judgment based on his own weighing of the competing interests at stake is a quintessentially discretionary function within the meaning of the FTCA.<sup>10</sup>

c. The third aspect of the government's conduct that petitioners have challenged in this litigation is the government's determination that Colonel Hart is "accounted for" for purposes of the ongoing effort to achieve the fullest possible accounting of American servicemen listed as killed or missing in action in Southeast Asia. The term "accounted for" is not a creature of statute; the term exists pursuant to Executive Branch policy and is defined in a Department of Defense "Policy Position" memorandum that is in

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<sup>10</sup> Petitioners assert that the disposition of remains was contrary to regulation and that the court of appeals "offhandedly dismissed petitioners' contention that violation of relevant military regulations brings this case squarely out of the protection afforded under the discretionary function exception." Pet. 11. There is no merit to this assertion. The court of appeals recognized that, in light of this Court's decision in *Berkovitz*, "the discretionary function exception does not apply if a government policy or regulation specifically prescribes a course of action." Pet. App. 11a n.8. The court noted, however, that petitioners had not argued in the district court that any regulations were violated, and the court correctly concluded that none of the regulatory provisions cited by petitioners on appeal "provides specific guidelines for what actions should be taken and how." *Id.* at 12a n.8.

the record in this case. See Pet. App. 13a. Where, as here, multiple deaths occur in a single aircraft crash and remains are recovered from the crash site, all of the previously unaccounted for individuals involved in the crash are to be listed as "accounted for" if the recovery of remains was thorough and the evidence indicates that the individuals died in the crash. Pursuant to that policy, Colonel Hart is listed as "accounted for" because (i) the government has determined that the Pakse recovery operation was thorough and (ii) the evidence indicates that all but two of the Pakse crewmen were killed in the crash.

The court of appeals was correct in holding that the determination that Colonel Hart is "accounted for" falls within the discretionary function exception since it is rooted in policy judgments with respect to which judicial scrutiny would be inappropriate. There are no suitable standards, and neither petitioners nor the district court provided any, that would enable a court meaningfully to evaluate whether a recovery operation like this one was "thorough." Pet. App. 14a n.10. Rather, the government's assessment that the recovery effort was thorough reflects the government's judgment that, as a practical matter, the United States has done everything it can do to recover remains from the Pakse crash site. See *id.* at 14a. Similarly, the record shows that the Defense Intelligence Agency was ultimately responsible for the assessment that Colonel Hart did not survive the downing of his aircraft, and the DIA's analysis of the government's accumulated intelligence information is a subject that is peculiarly ill-suited for judicial oversight. The district court committed an error of law to the extent that it purported to pass upon the merits of the Executive Branch's intelligence anal-

ysis, see *id.* at 13a-14a n.9, and the court of appeals was correct in ruling that by virtue of the discretionary function exception the governmental judgments underlying the determination that Colonel Hart is "accounted for" are not subject to judicial review in an FTCA action. *Id.* at 14a nn.9-10.

d. There is no need to hold this case pending this Court's decision in *United States v. Gaubert*, cert. granted, 110 S. Ct. 3211 (1990) (No. 89-1793). The question presented in *Gaubert* is whether supervisory actions taken by federal regulators of financial institutions may fall within the "discretionary function" exception, regardless of whether those actions may be categorized as "operational" in nature. In *Gaubert* the Fifth Circuit adopted a "policy"/"operational" distinction in applying the discretionary function exception, and then held that the actions complained of did not fall within the exception. As the Eleventh Circuit recognized in its opinion here, Pet. App. 9a, and as we pointed out in our certiorari petition in *Gaubert* (at 18-19), the Eleventh Circuit (like the Fifth Circuit) has adopted the so-called "planning"/"operational" distinction. But even accepting that distinction, the Eleventh Circuit concluded that the actions challenged here fit within the discretionary function exception. Pet. App. 9a-15a. Accordingly, the Court's decision in *Gaubert* will not affect the proper disposition of this case.

2. In any event, the holding that this action is barred by the discretionary function exception was not the sole basis for the Eleventh Circuit's decision. The court of appeals held in the alternative that the United States was entitled to judgment on the merits of petitioners' claim of intentional infliction of emotional distress. Pet. App. 15a-18a. That fact-

bound, state law ruling is correct, and does not warrant review by this Court.

As the court of appeals observed, the district court's conclusion that the United States committed the tort of intentional infliction of emotional distress "is difficult to understand." Pet. App. 17a. In the district court petitioners did not point to any evidence that government employees sought intentionally or recklessly to inflict emotional distress upon them, and as the court of appeals noted, *id.* at 16a & n.12, the district court did not refer to any such evidence. Petitioners have maintained throughout this litigation that CILHI's identification of certain remains as belonging to Colonel Hart was based on intentionally falsified anthropological records, but as the court of appeals correctly found, *id.* at 11a n.7, petitioners offered no evidence in support of this claim.

The court of appeals correctly held that as a matter of law the government's conduct was not improper, much less "outrageous." Pet. App. 17a-18a. Petitioners contend that Secretary Orr acted improperly when he informed Mrs. Hart in October 1985 that if she did not wish to accept her husband's remains, they would be buried with full military honors at Arlington National Cemetery. But the record shows that the Secretary promptly assented when Mrs. Hart requested that the interment be postponed. *Id.* at 17a. Petitioners also assert that the government improperly "persisted" in its identification of Colonel Hart. But the record shows that the government rescinded the identification upon Mrs. Hart's request. *Ibid.* The court of appeals correctly concluded that the government's actions to accommodate Mrs. Hart's wishes are sufficient in themselves to dispel any suggestion of improper conduct designed to

inflict emotional distress.<sup>11</sup> See *id.* at 18a; see also *id.* at 17a (noting Mrs. Hart's own testimony that throughout the proceedings the government treated her in a very pleasant manner).

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1990

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<sup>11</sup> Moreover, the court of appeals correctly observed that the government's assessment—that Colonel Hart was killed when his aircraft was shot down in combat—was quite reasonable under the circumstances. Pet. App. 13a; see *id.* at 13a-14a n.9 (noting congressional committee's conclusion that the evidence is overwhelming that all of the Pakse crewmen other than the two who parachuted out and were immediately rescued died in the crash); see also pp. 2-3 note 1, *supra*.